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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

H. RAY LAHR,
Plaintiff,

v.

NATIONAL SAFETY
TRANSPORTATION BOARD, et
al.,
Defendants.

CASE NO. CV 03-8023 AHM (AJWx)

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
FIRST TWO SUMMARY JUDGMENT
MOTIONS

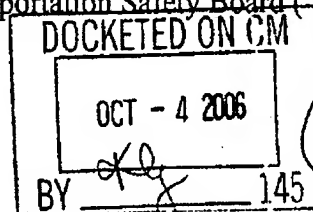
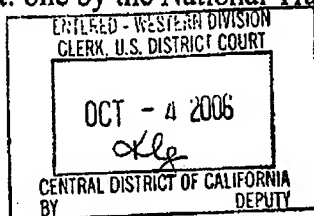
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AS REQUIRED BY FRCP, RULE 77(d).

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I. Background

On July 17, 1996, TWA Flight 800 exploded in mid-air off the coast of Long Island. The government conducted an investigation and issued its findings concerning the cause of the crash. Plaintiff H. Ray Lahr contends that the government's investigation was tainted by improper conduct and, perhaps, a cover-up. Partially in response, he filed this Freedom of Information Act ("FOIA") suit seeking access to records that the government created or utilized during this investigation.

This Order addresses two motions for summary judgment separately filed by the government: one by the National Transportation Safety Board ("NTSB")



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and one by the Central Intelligence Agency ("CIA").¹ Each agency claims that its search for records in response to Lahr's FOIA requests was adequate and that it properly redacted or withheld certain records based on exemptions authorized by FOIA.

Having reviewed the parties' arguments, evidence, and the records themselves, the Court GRANTS IN PART AND DENIES IN PART both the NTSB's Motion for Summary Judgment and the CIA's First Motion for Partial Summary Judgment. The Court finds that in most, but not all, respects the NTSB's search was adequate, and that the CIA's search was fully adequate. The deficiencies in the NTSB's search are set forth *infra*. (Essentially, they apply to Requests 76, 96 and 97. The NTSB must search for records of the formulas and data used for the BREAKUP program and for the BREAKUP and BALLISTIC computer programs themselves.) As to the exemptions, the following chart summarizes the outcome, as explained more fully in the text of this Order.

NTSB RECORDS

| <u>NTSB</u> | <u>PLAINTIFF</u> | <u>SUMMARY JUDGMENT</u> | <u>DISCLOSURE REQUIRED?</u> |
|-------------|------------------|-------------------------|-----------------------------|
| 6 | 56 | DENY | YES |
| 8 | 59 | DENY | YES |
| 15 | 70 | DENY | YES |
| 27 | 74 | GRANT/DENY IN PART | SOME (WITH SEGREGATION) |

CIA RECORDS

| <u>DOC. INDEX</u> | <u>MORI²</u> | <u>PLAINTIFF</u> | <u>SUMMARY JUDGMENT</u> | <u>DISCLOSURE REQUIRED?</u> |
|-------------------|-------------------------|------------------|-------------------------|-----------------------------|
| 903 | 603 | 50 | DENY | YES |

¹ The CIA also filed a separate, Second Motion for Partial Summary Judgment, which was resolved by this Court's Order of August 31, 2006. *See, Lahr v. Nat'l Transport. Safety Bd.*, ___ F.Supp. 2d ___ 2006 WL 2789870.

² The Document Index and MORI references are to the last three digits of the Government's numbering system. As the Court previously noted, the parties affixed multiple and confusing identifications to given documents.

| | | | | | |
|----|-------------------|-------------|------------------|-------------------------|-----------------------------|
| 1 | 318 | 343 | 2 | DENY | YES |
| 2 | 334 | 344 | 23 | GRANT | NO |
| 3 | 342 | 350 | 7 | DENY | YES |
| 4 | 324 | 352 | 18 | DENY | YES |
| 5 | 014 | 014 | 41 | DENY | YES |
| 6 | 015 | 015 | 9 | GRANT | NO |
| 7 | <u>DOC. INDEX</u> | <u>MORI</u> | <u>PLAINTIFF</u> | <u>SUMMARY JUDGMENT</u> | <u>DISCLOSURE REQUIRED?</u> |
| 8 | 016 | 016 | 10 | DENY | YES |
| 9 | 017 | 017 | 13 | DENY | YES |
| 10 | 018 | 018 | 42 | DENY | YES |
| 11 | 200 | 200 | 45 | DENY | YES |
| 12 | 202 | 202 | 32 | DENY | YES |
| 13 | 320 | 320 | 52 | DENY | YES |
| 14 | 194 | | 28 | GRANT/DENY IN PART | SOME (WITH SEGREGATION) |
| 15 | 195 | | 27 | GRANT/DENY IN PART | SOME (WITH SEGREGATION) |
| 16 | 196 | | 29 | DENY | YES |
| 17 | 024 | | 43 | GRANT | NO |
| 18 | 209 | | 46 | DENY | YES |

SCANNED

A. Factual Summary

1. The Crash Investigation and Ensuing FOIA Litigation

The government's investigation of the crash of Trans World Airline ("TWA") Flight 800 ("Flight 800") on July 17, 1996 has already been addressed in depth in the Court's August 31, 2006 First Summary Judgment Order. The Court expressly adopts that background and the findings set forth in that Order.

2. Plaintiff's Allegations of Government Impropriety

Plaintiff's main contention, which he seeks to prove through his FOIA requests, is that the Defendants helped participate in a massive cover-up of the true cause of the crash of Flight 800, which he believes was a missile strike. Because

1 Plaintiff alleges

2 that responsible officials acted negligently or otherwise improperly in the
3 performance of their duties, [he] must establish more than a bare suspicion in
4 order to obtain disclosure. Rather, the requester must produce evidence that
would warrant a belief by a reasonable person that the alleged Government
impropriety might have occurred.

5 *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). In the First
6 Summary Judgment Order, the Court considered the evidence proffered by Plaintiff
7 in support of his contention that the government acted negligently or improperly in
8 its investigation. Defendants did not object to or even respond to this evidence in any
9 of the three motions, so Plaintiff's assertions have not been repudiated.

10 In adopting here its previous finding that the evidence is sufficient to suggest
11 that the government acted improperly in its investigation of Flight 800 (or at least
12 performed in a grossly negligent fashion), the Court reiterates that that conclusion is
13 based on a characterization of the evidence in the light most favorable to Plaintiff, but
14 does not reflect or constitute any finding by the Court.

15 **B. Procedural Summary**

16 On November 6, 2003, Plaintiff H. Ray Lahr filed suit against the NTSB, and
17 later added as defendants the CIA and National Security Agency. Lahr is a former
18 Navy pilot and retired United Airlines Captain who has served as the Air Line Pilots
19 Association's Southern California safety representative for over fifteen years. Each
20 defendant is a government agency subject to FOIA, 5 U.S.C.A. § 552. On December
21 17, 2003, Lahr filed a First Amended Complaint, and on February 6, 2006, he filed
22 a Second Amended Complaint ("SAC"). The SAC seeks proper identification by the
23 Defendants of records responsive to requests that Lahr has made under FOIA,
24 preliminary and final injunctions prohibiting Defendants from further withholding
25 the records at issue, and a mandatory injunction requiring certain of Defendants'
26 computer and software programs to be made available to Plaintiff for inspection.
27 SAC, at pp. 6-7.

1 The three separate partial summary judgment motions that Defendants have
2 filed cover all records from which the government has redacted material, either in full
3 or in part. First, on June 8, 2004, the NTSB filed a Motion for Partial Summary
4 Judgment as to all redacted and withheld records originally found in that agency's
5 files. On September 27, 2004, the Court heard oral argument, took the motion under
6 submission, and ordered these records be provided in unredacted form for *in camera*
7 review.

8 Second, on August 16, 2005, the CIA filed its First Motion for Partial
9 Summary Judgment, concerning records found in CIA files. On October 18, 2005,
10 the Court took that motion under submission without oral argument, and recently
11 ordered that the records at issue in that motion be provided in unredacted form for *in*
12 *camera* review.

13 Third, on May 1, 2006, the CIA filed its Second Motion for Partial Summary
14 Judgment, concerning the remaining records found in CIA files. As already noted,
15 on August 31, 2006, this Court issued its First Summary Judgment Order, granting
16 in part and denying in part that motion. Many of the records included in the
17 Defendants' first and second motions are no longer at issue, and the Court need not
18 consider them at this time. However, the government's use of FOIA exemptions to
19 withhold or redact four records from the first motion and eighteen from the second
20 motion are still disputed. So are Defendants' requests for a ruling that their
21 respective searches for these records were adequate.

22 **II. Discussion**

23 **A. Legal Standards**

24 The relevant legal standards concerning both motions for summary judgment
25 and FOIA are found in the First Summary Judgment Order. 2006 WL 2789870 at *6
26 - 16. The Court expressly adopts the legal standards set forth in that Order and
27 incorporates them herein, by reference. In addition, the Court notes the following.
28

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 50 U.S.C.A. § 552(b). The burden lies with an agency to demonstrate that "no segregable, nonexempt portions [of a record] remain withheld." *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686, 700 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984); *Allen v. Cent. Intelligence Agency*, 636 F.2d 1287, 1293 (D.C. Cir. 1980). Agencies may meet this burden by describing through affidavit, in a non-conclusory manner, why such information is not reasonably segregable. *Wilkinson v. Fed. Bureau of Investigation*, 633 F. Supp. 336, 350 (C.D. Cal. 1986). Furthermore, an agency cannot justify withholding an entire document simply by showing it contains some exempt material; instead the non-exempt portions must be disclosed unless they are "inextricably intertwined" with the exempt portions. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 556 F.2d 242, 250 (D.C. Cir. 1977). Conversely, if an entire document is properly exempt, then no segregation is necessary.

B. Analysis

1. The Adequacy of the NTSB and CIA Searches

Defendants moved for summary judgment that the NTSB and CIA's searches were adequate.³ Plaintiff challenges Defendants' contentions. Defendants have the burden of establishing that their searches were adequate. (See pages 16-17 of the First Summary Judgment Order.)

a. The NTSB Search

Plaintiff submitted 145 specific FOIA requests to the NTSB. *Moye Decl.*, at ¶ 21. In order to establish that it conducted a reasonable search, the NTSB submitted

³ The NTSB's Motion for Summary Judgment did not explicitly state it was so moving, but Defendants argued the merits of such a motion, both factually and legally. Plaintiff's Opposition and Defendants' Reply treated this as a proper motion, and therefore Plaintiff had an adequate opportunity to oppose it. Therefore, the Court will treat Defendants' arguments as a properly-noticed motion.

1 the declarations of Melba D. Moye, the Chief of the Public Inquiries/FOIA Branch
2 in the Office of Research and Engineering at the NTSB; Dennis Crider, a National
3 Resource Specialist for Vehicle Simulation in the Vehicle Performance Division of
4 the Office of Research and Engineering of the NTSB; and Doug Brazy, a Mechanical
5 Engineer in the Vehicle Recorder Division.

6 The NTSB searched three sets of agency records: the NTSB Public Docket, the
7 Accident Briefs/Summaries and NTSB Accident Investigation Files. *NTSB S.G.I.* ¶
8 16; *Moye Decl.*, at ¶¶ 20(a)-(c). Moye described how the NTSB searched the
9 electronic indexes and databases constituting the NTSB Public Docket and the
10 Accident Briefs/Summaries. *Id.* at ¶¶ 20(a)-(b). To search the Accident Investigation
11 Files, the NTSB FOIA office contacted staff who might have potentially responsive
12 records and asked them to search for records responsive to Plaintiff's FOIA requests.
13 *Id.* at ¶¶ 20(c), 22. The NTSB searched for potentially responsive information only
14 where it believed it was reasonably expected to be located, based upon its
15 construction of the term "zoom-climb" that Plaintiff used in his requests. *Id.* at ¶ 24.
16 (Both parties agree that the term "zoom-climb" referred to the "flight path of the
17 aircraft following the loss of the forward fuselage." *NTSB S.G.I.* ¶ 14.) Similarly,
18 the NTSB construed the term "animation" to mean the "four graphical accident
19 reconstructions shown at the public hearing on December 8, 1997." *NTSB S.G.I.* ¶
20 23; *Moye Decl.*, at ¶ 25. These searches ultimately found several responsive records.
21 *Id.* at ¶ 30.

22 Crider was the only NTSB staff member "responsible for deriving the
23 calculations and/or computations of the flight path for TWA flight 800 [and] was the
24 only NTSB staff [member] who created a computer simulation of the flight path of
25 the accident airplane." *NTSB S.G.I.* ¶ 21; *Moye Decl.*, at ¶ 27; *Crider Decl.*, at ¶ 46.
26 Crider claims that by the time he received Plaintiff's FOIA requests, he had already
27 searched his files and provided all of his Flight 800-related records to the NTSB's
28 FOIA office, in response to previous requests Lahr had made. *Id.* at ¶ 47. These

1 prior records included his "handwritten notes, draft reports with handwritten
2 comments, preliminary graphs of results from the simulation program, a copy of the
3 executable computer simulation program from the TWA flight 800 investigation,"
4 data provided by Boeing, and some records from the Trajectory Study. *Id.* at ¶¶ 36-
5 37, 40. In response to Plaintiff's October 8, 2003 FOIA request, Crider reviewed the
6 Flight 800 records he had previously handed over to the FOIA office and also
7 searched for more records. *Id.* at ¶ 47. However, he located no new responsive
8 records. *Id.* Later, Crider located both "the last control system source file and the
9 aerodynamics source file specific to TWA Flight 800." *Supp. Crider Decl.*, at ¶ 6.
10 Crider's declaration explains, in detail, how he conducted records searches to respond
11 to groups of related FOIA requests by Plaintiff. *Crider Decl.*, at ¶¶ 48(a)-(f).

12 As a preliminary matter, simply because Crider located two responsive records
13 after his initial search and the NTSB's initial response to Lahr does not necessarily
14 undermine the adequacy of his search. A search is not unreasonable simply because
15 it fails to produce all relevant and responsive materials. *Meeropol v. Meese*, 790 F.2d
16 942, 952-53 (D.C. Cir. 1986). To reach the opposite conclusion "would work
17 mischief . . . by creating a disincentive for an agency to reappraise its position, and
18 when appropriate, release documents previously withheld." *Id.* at 953 (quotation
19 omitted).

20 Brazy was the only NTSB staff member "responsible for creating the
21 animations of the flight path of TWA flight 800 shown at the public hearing on
22 December 8, 1997." *NTSB S.G.I.* ¶ 22; *Moye Decl.*, at ¶ 28; *Brazy Decl.*, at ¶¶ 5, 7.
23 Brazy searched both his office and the space around the computer systems used to
24 create the four animations for records responsive to Plaintiff's requests. *Id.* at ¶ 30.
25 He provided the records he located to the FOIA office on two compact discs (CDs),
26 both containing electronic files; Brazy located no paper records responsive to Lahr's
27 requests. *Id.* at ¶ 38. Brazy also located two CIA files, which were referred to that
28 agency for response. *Id.* at ¶ 39; *Moye Decl.*, at ¶ 31.

1 Plaintiff submits a great deal of evidence that he believes is supportive of a
2 finding of agency bad faith regarding the crash investigation itself, but this evidence
3 is irrelevant to an analysis concerning the adequacy of the NTSB's search. Because
4 Lahr provides no evidence suggestive of bad faith of the NTSB in conducting its
5 search, the Court finds that it conducted the search in good faith. *See Meeropol*, 790
6 F.2d at 952.

7 An agency's search for documents must only be reasonable and does not have
8 to uncover every record that may potentially exist. *Zemansky*, 767 F.2d at 571. In
9 *Oglesby v. United States Department of the Army*, 920 F.2d 57, 67-68 (D.C. Cir.
10 1990), *appeal after remand*, 79 F.3d 1172 (D.C. Cir. 1996), the Court of Appeals for
11 the District of Columbia considered the adequacy of the State Department's search
12 for records. The FOIA requestor challenged the reasonableness of the search
13 "because the agency only searched the record system 'most likely' to contain the
14 requested information." *Id.* at 67. The court noted that "[t]here is . . . no requirement
15 that an agency search every record system." *Id.* at 68. However, the court found that,

16 [a] reasonably detailed affidavit, setting forth the search terms and the type of
17 search performed, and averring that all files likely to contain responsive
18 materials . . . were searched, is necessary to afford a FOIA requestor an
19 opportunity to challenge the adequacy of the search and to allow the district
20 court to determine if the search was adequate in order to grant summary
21 judgment.

22 *Id.* The court concluded that the agency had failed to satisfy its burden. *Id.* (noting
23 that the agency affidavit failed to "identify the terms searched or how the search was
24 conducted.").

25 Here, the NTSB recounted the general areas where responsive records were
26 reasonably likely to be located. *Moye Decl.*, at ¶ 20. Lahr was referred to public
27 records, which the NTSB also searched to no avail. *Id.* at ¶¶ 20(a)-(b). Regarding
28 the NTSB's Accident Investigation Files, the NTSB searched the locations where it
believed potentially responsive documents were located. *Id.* at ¶ 20(c). This
included the paper and computer files of NTSB employees from the Vehicle

1 Performance and Vehicle Recorder Divisions of the Office of Research and
2 Engineering whom the NTSB labeled as “principally responsible for the final Main
3 Wreckage Flight Path Study . . . and the creation of the animations.” *Id.* at ¶ 26. The
4 NTSB identified the employees who worked on the Main Wreckage Flight Path
5 Study as its focus because it was that study that led to the simulation of the flight path
6 of the main wreckage after the separation of the forward fuselage. *Id.* The Vehicle
7 Performance Division also searched for records related to the Trajectory Study
8 because some of that work ultimately contributed to the Main Wreckage Flight Path
9 Study. *Id.*

10 At first glance, it might seem that a search limited to those employees
11 “principally responsible” for the Main Wreckage Flight Path Study and animations,
12 *id.*, rather than *all* employees who worked on them, would not be “reasonably
13 calculated” to locate all relevant documents. However, it is undisputed that Crider
14 was the *only* staff member responsible for deriving the calculations and computations
15 of the flight path of Flight 800, and Brazy was the *only* staff member responsible for
16 the animations. *NTSB S.G.I.* ¶¶ 21-22. It stands to reason that they would have all
17 records concerning Plaintiff’s requests. Therefore, the Court finds that the NTSB’s
18 general search was adequate.

19 Turning to several specific requests that Lahr complains about, the Court notes
20 preliminarily that simply because the NTSB located no responsive records for many
21 of such requests does not make its search inadequate. Nor does Plaintiff cite
22 authority for his contention that the NTSB was required to correlate each record in
23 its *Vaughn* index to a specific FOIA request. Finally, that Plaintiff was provided with
24 some material beyond the scope of his requests does not render the NTSB’s search
25 inadequate. With these principles in mind, the Court now will address specific
26 claimed deficiencies in the NTSB’s search.

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1 **(i) Records of Formulas NTSB Used for Its "Zoom-Climb" Conclusion.**

2 "Category 1" of each of Plaintiff's FOIA requests 4-68 asks for "[a]ll records
3 of formulas used by the NTSB in its computations of the 'zoom-climb' conclusions."
4 (This refers, in part, to 64 graphs in the Main Wreckage Flight Path Study, and to two
5 Addendums.) The NTSB responded that some of these formulas are found in the
6 public docket, but beyond that, "the investigators may have referred to one or more
7 textbooks when working with the computer program for the TWA Flight 800 Main
8 Wreckage Flight Path Study, but no record was created." *Moye Decl.*, at ¶ 33(a);
9 *Crider Decl.*, at ¶ 48(a). Furthermore, some of these formulas are found in the
10 simulation program - - presumably Plaintiff's Record 70, see *infra* - - but according
11 to Crider they are not comprehensible as part of the simulation code, nor can they be
12 segregated without creating a new record. *Id.* Ultimately, beyond the records in the
13 public docket and the simulation program, the NTSB located no further responsive
14 records to these requests. *Moye Decl.*, at ¶ 33(a).

15 In arguing that the NTSB's search for these records was not adequate, Plaintiff
16 cites to the June 16, 2004 Affidavit of Brett M. Hoffstadt, a computational fluids
17 engineer, who states: "In my opinion, it is highly unlikely that Mr. Crider has no
18 record of any data, and no record of any formula, that he used to write any of these
19 64 graphs." *Hoffstadt Aff. (June 16, 2004)*, at ¶ 7. This is "insufficient to raise a
20 material question of fact with respect to the adequacy of the agency's search."
21 *Oglesby*, 920 F.2d at 68 n.13; see *SafeCard Servs. v. Sec. & Exch. Comm'n*, 926 F.2d
22 1197, 1201 (D.C. Cir. 1991) (speculation that documents might exist not enough to
23 undermine finding of adequate search). Plaintiff's contention regarding "Category
24 1" of each of Plaintiff's FOIA requests 4-68 lacks merit.

25 The same is true as to Plaintiff's bald assertion, based solely on his expert's
26 opinion, that the NTSB must have records of correlation of flight trajectory radar,
27 radio transmissions and flight recorder data. See *NTSB Opp'n*, at p. 25. Such a

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1 contention, without supporting evidence, is not sufficient to dispute the government's
2 declarations that no such records were found.

3 **(ii) Records Upon Which the CIA Animation Was Based.**

4 Plaintiff submitted four FOIA requests for such records. However, Moyer
5 claims the NTSB had "no role in the creation of the animation presented by the [CIA]
6 in November 1997" and does "not know what, if any, information was used by the
7 CIA in creating its video." *Moye Decl.*, at ¶ 38; *see also Crider Decl.*, at ¶ 53; *Beazy*
8 *Decl.*, at ¶ 41.

9 Plaintiff disagrees, citing to additional records. For example, he purports to
10 quote a transcript of the CIA's presentation of the animation on CNN. Plaintiff
11 claims that the transcript states: "The preceding CIA analysis included . . . data
12 provided by the NTSB." *See NTSB S.G.I.* ¶ 27. However, the transcript *actually*
13 reads: "This [the CIA's conclusion as to the flight path of the aircraft] is consistent
14 with information provided by NTSB investigators and Boeing engineers who
15 determined that the front third of the aircraft, including the cockpit, separated from
16 the fuselage within four seconds after the aircraft exploded." *Donaldson Aff.*, at ¶ 57
17 & Exh. 19 (CIA Animation Transcript), p. 1 (Bates 111). The transcript goes on to
18 explain the process by which the CIA came to its conclusions; at no point does it
19 mention utilization of any NTSB data. *Id.*, Exh. 19, pp. 1-2 (Bates 111-12).

20 Plaintiff also cites to a portion of the Crider Declaration, in which Crider
21 states: "I learned that Boeing was providing [aircraft data] to the Central Intelligence
22 Agency (CIA), as well as developing its own basic estimate of the flight path, so
23 Boeing then included the NTSB on the routing of this data." *Crider Decl.*, at ¶ 13.
24 This excerpt does not support Plaintiff's contention that the NTSB was involved in
25 the creation of the CIA animation.

26 Next, Plaintiff also quotes from a response from the CIA to an earlier FOIA
27 request that he had made. The CIA letter states that, in response to requests for
28 records pertaining to the computer program and data used to produce the computer

1 simulation of Flight 800, "the pertinent data, and resulting conclusions, were
2 provided by the National Transportation Safety Board (NTSB). CIA simply
3 incorporated the NTSB conclusions into our videotape." *Lahr Aff.*, Exh. 16 (Bates
4 391). Although Defendants have repeatedly explained the difference between a
5 "simulation" and "animation" (or graphical reconstructions), the second sentence of
6 the CIA's response - - that the NTSB conclusions were incorporated into the CIA's
7 videotape - - would be sufficient to raise a material issue of fact as to whether the
8 CIA animation also incorporated data provided by the NTSB. Nevertheless, the
9 record is clear that the NTSB conducted a proper search for all the records it used in
10 its calculations concerning the "zoom-climb" conclusion.

11 **(iii) Records "Related To" The NTSB Animations.**

12 Plaintiff challenges the NTSB's response to his request for essentially all
13 records "related to" the four NTSB animations of the crash that were shown at a
14 December 8, 1997 public hearing. Defendants claim that all responsive records
15 found in the possession of Brazy were released to Plaintiff (with the exception of two
16 records referred to the CIA).⁴ *Moye Decl.*, at ¶ 34. As noted earlier, Brazy was the
17 only NTSB staff member responsible for creating these animations. *NTSB S.G.I.* ¶
18 22; *Moye Decl.*, at ¶ 28; *Brazy Decl.*, at ¶¶ 5, 7. Presumably, he would have the data
19 or other information that he used in creating the animations. *See Id.* at ¶¶ 8-12, 16,
20 18-19, 33. Brazy stated that the "animations are a visual depiction of the data
21 presented from the radar sources, the digital flight data recorder, and/or the data from
22 the simulations presented in the Main Wreckage Flight Path and Trajectory Studies."
23 *Id.* at ¶ 8. He also noted that the animations used "verified data and FDR data," as
24 well as the results of the Main Wreckage Flight Path Study, which was based in part
25 on Crider's simulation data. *Id.* at ¶¶ 17-18. Crider agreed with Brazy's descriptions.
26 *Crider Decl.*, at ¶¶ 50-51. Brazy searched his office "and the space around the
27

28 ⁴ Plaintiff mistakenly states that the NTSB claimed it had "no responsive records." *NTSB Opp'n*, at p. 24. *See, infra.*

1 computer systems" used to create the four animations. *Id.* at ¶ 30. If Plaintiff had
2 simply requested materials used directly to create the animations, Brazy's search
3 would have been sufficient. However, many of Plaintiff's requests concerning the
4 animation ask for *all* records used by the NTSB to come to the zoom-climb
5 conclusion upon which the animations were based. Essentially, this is the same
6 request discussed earlier, however, and if the NTSB had limited its search only to the
7 efforts of Brazy, it might have been inadequate, because the NTSB also was required
8 to search for underlying records used in the analysis leading to the "zoom-climb"
9 conclusion.

10 Although Lahr's FOIA requests encompassed the records underlying the data
11 Brazy used to create the animations, and not just the data he directly used in doing
12 so, the NTSB's search still was not inadequate, because it did look for all records of
13 formulas used in its calculations concerning the "zoom-climb" conclusion.

14 Finally, Plaintiff argues that the records Brazy actually located are inadequate
15 because they are not useful for his purposes, at least not without additional
16 information. *See McGauley Aff.*, at ¶¶ 3-4 (Bates 470). Whether the responsive
17 records are useful or not is irrelevant to the adequacy of the NTSB search.

18 **(iv) The BALLISTIC and BREAKUP Programs.**

19 The Court finds that the NTSB's search for records responsive to FOIA
20 requests 76, 96, and 97 was inadequate.

21 Plaintiff challenges the NTSB's failure to produce two computer programs --
22 the BALLISTIC program and the BREAKUP program -- in response to several
23 FOIA requests. Defendants contend that the "predicate for Lahr's 145 [FOIA]
24 requests was the 'zoom-climb conclusion,'" and if the programs were not used to
25 come to this conclusion, they were not responsive. *See NTSB Reply*, at p. 23.
26 Defendants argue that these two programs were not used to determine the aircraft's
27 flight path after the separation of the nose section and forward fuselage. *See Moye*
28 *Decl.*, at ¶ 36. Moye explains that the BREAKUP program provided the *timing* of

1 when the nose separated from the aircraft, which was used in the simulation, and both
2 programs were used to determine the trajectory of certain pieces of the aircraft (not
3 including the main body, apparently). *Id.*

4 The Court agrees with Plaintiff that, concerning FOIA request 76, the
5 BREAKUP program was used to help reach the "zoom-climb conclusion," so far as
6 the nose separation timing was a factor in this conclusion. *See id.* Therefore, the
7 Court ORDERS NTSB to review its records to locate "[a]ll records of the formulas
8 and data entered into the computer simulations" that involved the calculation of the
9 nose separation timing and provide any responsive records to Plaintiff, subject to any
10 applicable exemptions.

11 Defendants have adequately established that no records were responsive to
12 FOIA request 77 because the BALLISTIC program was not used in any manner in
13 connection with the "zoom-climb conclusion."

14 FOIA requests 96 and 97, although inartfully drafted, are for the BREAKUP
15 and BALLISTIC programs themselves. Despite Defendants' contentions, there is no
16 modifying language that limits the requests for these programs. *See Miller v. Casey*,
17 730 F.2d 773, 777 (D.C. Cir. 1984) (FOIA request is read as drafted, not as someone
18 wishes it might be drafted). Therefore, the Court ORDERS the NTSB to review its
19 records to locate the BREAKUP and BALLISTIC programs and provide those
20 programs, if located, to Plaintiff, subject to any applicable exemptions.

21 (v) Records of the Process by Which the NTSB Reached its "Zoom
22 Climb" Conclusions.

23 Plaintiff disputes the adequacy of the NTSB's search in response to his request
24 for "[a]ll records of the process by which the NTSB arrived at its zoom-climb
25 conclusions." (FOIA request 136 and FOIA requests 138 through 141, which are
26 subsets of request 136.) The NTSB did not search for records responsive to this
27 request, stating that the request "is too inexact for the agency to determine how to
28 search for responsive records." *Moye Decl.*, at ¶ 33(j). The NTSB suggested to Lahr

1 that he amend this request to more clearly identify which records he sought, but he
2 did not do so. *Id.* Plaintiff responds that the term "process" is "broad but not too
3 inexact for defendant to search for records of the method by which it arrived at its
4 zoom-climb conclusion." *See Joint Statement*, at p. 923.

5 Under FOIA, an agency is required to make records promptly available upon
6 a request that "reasonably describes" the records sought. 5 U.S.C.A. § 552(a)(3)(A).
7 "A description 'would be sufficient if it enabled a professional employee of the
8 agency who was familiar with the subject area of the request to locate the record with
9 a reasonable amount of effort.'" *Marks v. United States Dep't of Justice*, 578 F.2d
10 261, 263 (9th Cir. 1978) (citation omitted). This requirement should not be treated
11 as a loophole by agencies, but "broad, sweeping requests lacking specificity are not
12 permissible." *Id.*

13 If an agency knows "'precisely' which of its records have been requested and
14 the nature of the information sought" from those records, then the records requested
15 have been adequately described. *See, e.g., Yeager v. Drug Enforcement Agency*, 678
16 F.2d 315, 326 (D.C. Cir. 1982). Here, unlike in *Yeager*, there is evidence that the
17 agency was truly and understandably unclear as to the nature of Plaintiff's request.
18 *See Moye Decl.*, Exhs. II-14, II-15 (November 6, 2002 and November 6, 2003 letters
19 to Plaintiff that requested clarification of the meaning of "process"). If Lahr intended
20 this to be a catch-all provision - - as is suggested by his description that this "request
21 seeks any records not otherwise specifically identified" - - then even if he had drafted
22 it as such the NTSB could not have conducted a reasonable search, under the
23 circumstances.

24 b. The CIA Search

25 Plaintiff originally submitted 105 FOIA requests to the CIA, but the Court
26 struck all but 17, pursuant to a Stipulation and Order dated July 13, 2005. The CIA
27 has moved for a ruling that it conducted a reasonable search of its records
28 to find all responsive records to those remaining requests. In support of this, the CIA

1 submitted the declaration of Terry Buroker, the Information Review Officer for the
2 Directorate of Intelligence ("DI") of the CIA. *First Buroker Decl.*, at ¶ 1. Buroker
3 explained that the Public Information Programs Division ("PIPD") in the Office of
4 Information Management Services is the initial reception point in the CIA for all
5 FOIA requests. *Id.* at ¶ 19. The CIA does not maintain a centralized records system.
6 *Id.* at ¶¶ 15-16. Therefore, each FOIA request is analyzed to determine which of four
7 directorates of the CIA might reasonably be expected to possess responsive records.
8 *Id.* at ¶ 19. PIPD will forward copies of the request with instructions to conduct such
9 a search for these records. *Id.* That is the procedure that was followed in this case.
10 *Id.* at ¶ 20.

11 In this case, PIPD determined that the Directorate of Intelligence ("DI") was
12 the only directorate "reasonably likely to have records responsive to the Plaintiff's
13 request[s]." *Id.* at ¶ 21. The DI is the CIA component that "analyzes, interprets, and
14 forecasts foreign intelligence issues and world events of importance to the United
15 States." *Id.* at ¶ 22. DI personnel who are trained to conduct FOIA and other record
16 searches conducted a search of the automated DI records system. *Id.* at ¶ 23. "No
17 responsive information was located in the automated records systems at the
18 directorate level." *Id.* When this search proved unproductive, Buroker's office
19 requested the Office of Transnational Issues ("OTI") in the DI to conduct a separate
20 search for records. *Id.* at ¶ 24. A senior OTI weapons analyst who was one of the
21 principal analysts on the Flight 800 team participated in the search, which extended
22 to "office and individual analyst files, including local databases, e-mail, and desk
23 files." *Id.* This search led to records that were forwarded to Buroker's office. *Id.*

24 The records were searched a second time, which led to additional responsive
25 material. *Id.* at ¶ 25. Buroker claims that most of the specific requests were
26 "unintelligible, did not describe records in terms that were meaningful to the CIA, or
27 sought records that could only be found at the NTSB," *id.* at ¶ 25 n.7. Therefore,
28 Buroker's staff focused on Plaintiff's overarching request for "records upon which

1 [the] publicly released aircraft flight path climb conclusion was based." *Id.* at ¶ 24.
2 Ultimately, this resulted in the identification of about one hundred records, *Id.* at ¶
3 25.

4 The CIA submitted its first *Vaughn* index, attached to the First Buroker
5 Declaration, on June 20, 2005. On August 16, 2005, the CIA supplemented this
6 *Vaughn* index by submitting the Second Buroker Declaration, to which was attached
7 copies of all records that were withheld only in part by the government. The Second
8 Buroker Declaration also added two records not previously identified in the CIA's
9 first *Vaughn* index.

10 Plaintiff's first challenge to the adequacy of the CIA's search argues that the
11 CIA's *Vaughn* index was filed without a copy of the records, and that the 107 pages
12 accounted for in the index did not match the 246 pages the CIA supposedly produced
13 in February, 2005. Plaintiff also argues that, adding the 128 pages for the two new
14 records identified in the Second Buroker Declaration, the total should have been 255
15 pages, but the filing contained 388 pages. Plaintiff is wrong. The CIA's response
16 appears to be in good faith. The motion and the *Vaughn* index included 327 pages
17 of records withheld in full or in part and attached to one or the other of the CIA's
18 February and June 17, 2005 transmittal letters. Plaintiff submits no evidence in
19 dispute of this.⁵ The Second Buroker Declaration adds two additional records,
20 together totaling 128 more pages, to the thirty records and 327 pages identified in the
21 *Vaughn* index. Together, 32 records consisting of 455 pages are at issue. Given that
22 the CIA withheld in full six records consisting of 66 pages, 389 pages should appear
23 in the Second Buroker Declaration. This is *exactly* how many actually appear.
24 Plaintiff's contention is without merit or mathematical support.

25
26
27 ⁵ For instance, Plaintiff does not submit as evidence copies of the attachments
28 at Tabs B and C of the February and June letters, and his page totals found in
footnotes 1, 2 and 4 of the Sur-Reply lack supporting evidence and contain
mathematical errors such that the Court cannot rely on them.

1 Next, Plaintiff argues that the MORI numbering system utilized by the CIA did
2 not allow Plaintiff "to decipher what records were produced and withheld nor to
3 correlate the exemptions asserted with the records withheld." With this, the Court
4 cannot agree, although the *Vaughn* index was inadequate to the extent that it did not
5 include redacted copies of those records withheld only in part and that it contained
6 a different document indexing system than that used in the CIA's earlier transmittal
7 letters. Notwithstanding that the CIA's MORI document numbering system is
8 confusing and frustrating, in ¶ 8 of his Second Declaration Buroker clearly identified,
9 via cross references, each record based on the CIA's MORI Document ID number (as
10 found in the transmittal letters), its *Vaughn* Document Index number (essentially a
11 "second" MORI number), and its *Vaughn* Document Index page number (which
12 contained the government's bases for withholding all or part of each record). From
13 this chart, Plaintiff was able to compare these record numbers, and refer to the
14 government's description of each record. For Plaintiff to note two typographical
15 errors, see *Schulze Aff.*, at ¶ 25, is typically nit-picky; Plaintiff was clearly able to
16 identify and rectify these errors with little trouble and they are not evidence of bad
17 faith. Finally, although Plaintiff claims there is no entry for the "Analyst Note"
18 identified on page 59 of the *Vaughn* index, the fact that this record had been
19 withheld in full was clearly revealed in paragraph 16 of the Second Buroker
20 Declaration, and because it was withheld in full, there was no redacted record for
21 Plaintiff to review.

22 Next, Plaintiff argues that multiple records contained the same MORI numbers,
23 and, conversely, other records were spread out in pages containing differing MORI
24 numbers. See also *Schultze Aff.*, at ¶ 22. Defendant explains that much of the
25 responsive material to Lahr's FOIA request was located in analyst working files.
26 *Koch Decl.*, at ¶ 15. As such, this material may not contain official document
27 numbers, page numbers or dates, and may be handwritten or contain handwritten
28 annotations. Alternatively, it may be in electronic form or consist of copies of

1 electronic communications. *Id.* Furthermore, such documents are not necessarily
2 "complete" and may contain extracts of documents, books or other "snippets of
3 information." *Id.* One record often consists of multiple documents containing
4 attachments, such as cover memoranda or notes to files with attachments. *Id.* at ¶ 16.
5 Such information is copied and produced "as is," and the CIA does not alter the
6 content by reorganizing documents. *Id.* at ¶ 17. The government's explanation is
7 adequate, and Plaintiff's allegations are not evidence of governmental bad faith.

8 Next, Plaintiff argues that at least four records previously produced in redacted
9 form were missing from the Second Buroker Declaration, and the "document records
10 have been redacted by removing an unknown number of important pages." *See*
11 *Schultze Aff.*, at ¶¶ 30-32, 39, 61. Unfortunately, the Schultze Affidavit itself is
12 largely incomprehensible, and the affiant often fails to provide support for conclusory
13 statements that pages have been removed. (*E.g.*, ¶¶ 31, 32 and 49.) As already noted,
14 the CIA has no obligation to reassemble or reconstruct the original document.

15 Next, Schultze argues that MORI Document ID numbers 1147417 and
16 1147418 were listed in the CIA index but not produced with the Second Buroker
17 Declaration. *Schultze Decl.*, at ¶¶ 61-62. The Court could not find such references
18 in the CIA's indexes listed in the February and June letters, the *Vaughn* index, and
19 the Second Buroker Declaration. Once again, these allegations do not establish bad
20 faith on the part of the government.

21 Next, Plaintiff complains that one record - - an "Analyst Note" - - appearing
22 in the *Vaughn* index did not appear in the Second Buroker Declaration, and that
23 although Buroker states six records were withheld in full, only five appear in the
24 *Vaughn* index. There was an error at page 59 of the *Vaughn* index, and it was
25 corrected. *Second Buroker Decl.*, at ¶ 16. Again, there is no evidence of bad faith
26 on the part of the government concerning this record.

27 Next, Plaintiff argues that the CIA failed to identify nine responsive records
28 which it maintains in electronic format. *See Id.* at ¶¶ 31, 33, 44, 47, 62, 66-69.

1 Plaintiff offers no persuasive basis for finding that some of these records even exist.
2 Nor is there evidence to suggest that the CIA searched in bad faith or did not conduct
3 an adequate search for these records.

4 Finally, Plaintiff argues, in his Sur-Reply, that the *Vaughn* index was
5 inadequate because it was essentially spread out among two documents: the *Vaughn*
6 index filed on June 20, 2005, and the Second Buroker Declaration filed on August
7 16, 2005. A *Vaughn* index should be "contained in one document, complete in itself."
8 *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).
9 Additionally, an index with as many records and pages as this one should contain a
10 table of contents as well as tabs for each document, as did the CIA's recent *in camera*
11 submission. Although the CIA did not present the index this way, the Court cannot
12 find that its actions were in bad faith.

13 The CIA's search for records was adequate.

14 **2. Claims of Exemption**

15 a. Exemptions 6 and 7(C) (Privacy Redactions): Plaintiff's
16 Records 2, 7, 10, 18, 28, 41, 42, 43, 50 and 52

17 In ten records, the CIA redacted the names of eyewitnesses, eyewitness
18 identification numbers, or both, claiming the redactions were proper under
19 Exemptions 6 and 7(C). Plaintiff challenges many of these reactions. Preliminarily,
20 the Court finds (because a balancing analysis is in order) that the government's
21 investigation and findings concerning the crash of TWA Flight 800 involve a matter
22 of great public interest. *See*, First Summary Judgment Order, ___ F.Supp. 2d ___,
23 2006 WL 2789870 at *20.

24 Defendants describe Plaintiff's Record 2,⁶ dated February 12, 1997, as an
25 "[i]nternal memo that makes recommendations as to questions that should be asked
26 specific eye witnesses to the explosion during interviews." *First Buroker Decl.*, at
27

28 ⁶ Plaintiff's Record 2 is also identified by Document Index # 1147318 and
MORI Document ID # 1176343.

1 p. 43. It is one page in length and the sender and recipients are redacted in the
2 released copy. The deletion of their names is not contested, but eighteen redactions
3 of eyewitness names under Exemptions 6 and 7(C) are challenged. Plaintiff's
4 Record 7⁷ is a "Technical Analysis Briefing of TWA Flight 800 prepared for James
5 K. Kallstrom, Assistant Director, FBI, containing background information, data
6 sources, analysis, diagrams and summaries of eye witness accounts." *Id.* at p. 49. It
7 appears to be a 38-page PowerPoint presentation from March 1997. The names of
8 two FBI Special Agents; for whom this record was apparently also prepared, are
9 redacted.

10 Defendants describe Plaintiff's Record 10,⁸ dated April 16, 1997, as an
11 "[i]nternal email containing information relating to one particular eyewitness account
12 of TWA 800 explosion and analysis attempting to place relative to second
13 eyewitness." *Id.* at p. 64. It is one page in length and eyewitness names are
14 redacted.⁹

15 Defendants describe Plaintiff's Record 18,¹⁰ dated October 17, 1997, as an
16 "[i]nternal email discussing new radar plots, certain eyewitness accounts, how they
17 correlate, and impact on analysis." *Id.* at p. 51. It is two pages in length. Plaintiff
18 contests ten redactions of eyewitness names or identification numbers under
19 Exemptions 6 and 7(C); eight other redactions, either of CIA employees under
20 Exemption 3 or FBI special agents under Exemptions 6 and 7(C), are not contested.

22
23 ⁷ Plaintiff's Record 7 is also identified by Document Index # 1147342 and
24 MORI Document ID # 1176350.

25 ⁸ Plaintiff's Record 10 is also identified by MORI Document ID # 1215016.

26 ⁹ Although somewhat confusing due to a numbering mistake, the Joint Chart
27 makes clear that Plaintiff only means to challenge this record's privacy redactions
28 under Exemptions 6 and 7(C).

¹⁰ Plaintiff's Record 18 is also identified by Document Index # 1147324 and
MORI Document ID # 1176352.

1 Defendants describe Plaintiff's Record 28,¹¹ dated March 17, 1998, as a
2 "[d]raft report containing preliminary analysis and conclusions regarding radar
3 tracking of TWA Flight 800." *Id.* at p. 56. This seventeen-page record, entitled
4 "Analysis of Radar Tracking of the TWA 800 Disaster on July 17, 1996," was
5 withheld in full and contains a redaction of the name of an FBI special agent.

6 Plaintiff's Record 41¹² consists of "[b]ar charts of data illustrating the timeline
7 of eyewitness visual and audio accounts of TWA 800 explosion and handwritten
8 analyst notes containing underlying data." *Id.* at p. 67. It is undated and is nine
9 pages long, consisting of seven pages of computer-generated bar graphs, with each
10 witness's name redacted adjacent to graphs of the timing of their observations of the
11 crash, and two pages of handwritten notes, of which the only redacted portion is
12 handwritten eyewitness names. Plaintiff contests all of these redactions.

13 Defendants describe Plaintiff's Record 42,¹³ dated November 14, 1997, as an
14 eight-page "[i]nternal email with attachments described as final reports to FBI: key
15 points of analysis, TWA 800 questions and answers, reports as to what eyewitnesses
16 saw, and two subsets of brief summaries of certain eyewitness accounts." *Id.* at p. 70.
17 Plaintiff contests twenty-three redactions of eyewitness names under Exemptions 6
18 and 7(C); other redactions under Exemption 3 are not contested.

19 Defendants describe Plaintiff's Record 43¹⁴ as a "draft with handwritten
20 annotations reflecting candid discussion and opinions of individuals both within and
21 between FBI and CIA regarding CIA analysis of eyewitness reports." *Id.* at p. 65.

22
23 ¹¹ Plaintiff's Record 28 is also identified by MORI Document ID # 1215194.
24 This record also contains other contested redactions which are addressed later in this
25 Order.

26 ¹² Plaintiff's Record 41 is also identified by MORI Document ID # 1215014.

27 ¹³ Plaintiff's Record 42 is also identified by MORI Document ID # 1215018.

28 ¹⁴ Plaintiff's Record 43 is also identified by MORI Document ID # 1215024.
This record also contains other contested redactions which are addressed later in this
Order.

1 It is five pages long, undated and withheld in full. Plaintiff does not contest
2 Defendants' redactions of names of CIA employees under Exemption 3, although he
3 does contest the redactions of the names of FBI special agents and eyewitnesses
4 under Exemptions 6 and 7(C), as well as the withholding of the entire record under
5 Exemption 5.

6 Plaintiff's Record 50¹⁵ is a 48-page spreadsheet "containing names of
7 eyewitnesses (over 230) interviewed following TWA 800 explosion and other
8 associated data - - e.g., location utilized in sound propagation analysis." *Id.* at p. 55.
9 The record is undated. The CIA redacted every eyewitness name from this
10 document, and Plaintiff challenges each redaction.

11 Defendants describe Plaintiff's Record 52¹⁶ as a report that "[c]ontains
12 eyewitness accounts of the destruction of TWA Flight 800, including location,
13 observations, and analysis regarding distance and direction of respective eyewitness
14 at the time of the explosion and elapsed time for initial sound to reach the witness."
15 *Second Buroker Decl.*, at p. 17. It is undated, and the record contains redactions of
16 names and initials of eyewitnesses on each page, all of which Plaintiff challenges.¹⁷

18 ¹⁵ Plaintiff's Record 50 is also identified by Document Index # 1080903 and
19 MORI Document ID # 1175603.

20 ¹⁶ Plaintiff's Record 52 is also identified by MORI Document ID # 1232320.

21 ¹⁷ Plaintiff did not initially contest most of Defendants' redactions under
22 Exemptions 6 and 7(C). In their Reply to the CIA's Second Motion for Partial
23 Summary Judgment, Defendants stated:

24 When plaintiff responded to the First CIA Motion, he did not oppose the use
25 of Exemption 6 or, in the alternative[,] Exemption 7(C) to withhold, from the
26 records covered by the First CIA Motion, the names of FBI agents or of
27 eyewitnesses to the explosion of TWA Flight 800 . . . Changing his position,
28 he now alleges that he *does* contest the use of the above exemptions to
withhold, from those records, the names of FBI agents and eyewitnesses.

Def. Reply, at p. 16 n.2. However, in the Joint Chart filed on July 21, 2006, Plaintiff
opposed the redactions in all of these nine records on Exemption 6 and 7(C) grounds,
and Defendants did not object to Plaintiff's right to do so (as they did to some of

1 As with the Second CIA Motion, Defendants argue that the eyewitnesses to the
2 crash have a privacy "interest in not being subjected to unofficial questioning about
3 the analytic project or investigation at issue and in avoiding annoyance or harassment
4 in their . . . private lives." *First Buroker Decl.*, at ¶ 46. Defendants' support for their
5 asserted privacy interest is identical to that set forth in the Second CIA motion.

6 For the reasons set forth in the August 31, 2006 Summary Judgment Order,
7 the Court finds that Defendants have not established a protectible privacy interest that
8 would be implicated by the release of witness identification numbers, and that the
9 public interest in uncovering alleged agency malfeasance and wrongdoing in the
10 investigation of the crash of Flight 800 outweighs the privacy interest that
11 conceivably exists in eyewitness names. F.Supp. 2d ___, 2006 WL 2789870 at *14-
12 16 and *20-21. The Court further finds that under Exemption 7(C) the release of
13 these names could not reasonably be expected to constitute an unwarranted invasion
14 of personal privacy, and, under Exemption 6, their release would not constitute a
15 clearly unwarranted invasion of personal privacy. For these reasons, the Court
16 DENIES summary judgment concerning the eyewitness names, initials and
17 identification numbers in these records.

18 Defendants also redacted names of FBI agents involved in the investigation of
19 the crash of Flight 800. (That was not an issue in the Second CIA Motion.) Are
20 privacy rights in the names of FBI agents different than those in the names of
21 eyewitnesses? "FBI agents have a legitimate interest in keeping private matters that
22 could conceivably subject them to annoyance or harassment." *Hunt v. Fed. Bureau*
23 *of Investigation*, 972 F.2d 286, 288 (9th Cir. 1992). Exemption 7(C) is often invoked

24 _____
25 Plaintiff's other contentions). Defendants claim Plaintiff's earlier statement should
26 be treated as a binding waiver. *Id.* However, the Court finds that Plaintiff's express
27 arguments in the Second CIA Motion, coupled with the parties' joint submission of
28 Plaintiff's contested redactions as found in the Joint Chart, provided clear notice that
Plaintiff intended to ultimately challenge these redactions. Moreover, Defendants
were permitted an opportunity to respond to Plaintiff's arguments. Therefore, the
Court will consider Plaintiff's opposition to these redactions.

1 when agents are involved in criminal or quasi-criminal investigations. *See, e.g.,*
2 *Cleary v. Fed. Bureau of Investigation*, 811 F.2d 421, 423-24 (8th Cir. 1987);
3 *Coleman v. Fed. Bureau of Investigation*, 13 F. Supp. 2d 75, 80 (D.D.C. 1998). The
4 identity of the target or defendant in a criminal investigation is the key factor in
5 whether agents are likely to be harassed or annoyed if their names are disclosed. For
6 instance, in *Cleary*, the court concluded that exposing agents to harassment by
7 persons carrying grudges were sufficient reasons to avoid disclosure, although it also
8 noted that these privacy interests might be outweighed if the public interest in
9 disclosure is greater. 811 F.2d at 424. Here, the investigation ultimately concluded
10 that there was no criminal wrongdoing. There being no aggrieved "target" or
11 defendant, the Court finds it unlikely that the FBI agents will be subjected to
12 harassment or annoyance. Furthermore, without revealing other contact information,
13 such as addresses or phone numbers, it is less likely, ten years later, that "revealing
14 their names will engender an avalanche of inquiries to these officials." *See Gordon*
15 *v. Fed. Bureau of Investigation*, 388 F. Supp. 2d 1028, 1044 (N.D. Cal. 2005). In
16 *Gordon*, plaintiffs argued that government redactions of Transportation Security
17 Agency employees' names under Exemptions 6 and 7(C) were improper. The court
18 found that the Government's creation and maintenance of travel watch-lists were part
19 of government policy-making, and that "[k]nowing *who* is making government policy
20 with respect to the watch lists is relevant to understanding *how* the government
21 operates." *Gordon*, 388 F. Supp. 2d at 1041 (emphasis in original). The same could
22 be said here. The FBI agents were integrally involved in developing the information
23 that the government points to for its ultimate conclusion regarding the probable cause
24 of Flight 800's crash. Similarly, when the reliability of an investigation's
25 methodology is in doubt, investigators have less of a right to be sheltered from public
26 scrutiny. *Castaneda v. United States*, 757 F.2d 101, 1012 (9th Cir. 1985).

27 Moreover, because Plaintiff has alleged that "responsible officials acted
28 negligently or otherwise improperly in the performance of their duties," the agents'

1 privacy interest is diminished. *Favish*, 541 U.S. at 174; *see SafeCard Servs. v. Sec.*
2 *& Exch. Comm'n*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (access to names which
3 might confirm or refute evidence of agency impropriety increases public interest);
4 *Neely v. Fed. Bureau of Investigation*, 208 F.3d 461, 464 (4th Cir. 2000) (with
5 allegations of agency impropriety, release of names would help supplement public
6 understanding of the agency's activities).

7 The Court concludes that the release of the names of FBI agents could not
8 reasonably be expected to constitute an unwarranted invasion of their privacy.
9 Therefore, the Court DENIES summary judgment concerning the agents' names
10 found in these records.

11 b. Exemption 3 (CIA Redactions): Plaintiff's Records 9 and
12 23

13 Defendants describe Plaintiff's Record 9,¹⁸ dated April 15, 1997, as an
14 "[i]nternal email noting that one FBI agent thinks the accuracy of the clock [aboard]
15 TWA Flight 800 may be problematic." *First Buroker Decl.*, at p. 68. It is one page
16 in length and the sender and recipients, all CIA employees, are redacted in the
17 released copy. Plaintiff challenges the redactions of the name of the author of this
18 email, which is found in redactions 1 and 5.

19 The Court already addressed this issue in its previous Summary Judgment
20 Order, and adopts its reasoning and conclusion here. See ___ F.Supp. 2d ___, 2006
21 WL 2789870 at *9-10. The CIA is exempted from disclosing the names of its
22 employees. 50 U.S.C.A. § 403g; *see Minier v. Central Intelligence Agency*, 88 F.3d
23 796, 801 (9th Cir. 1996) (material within the purview of section 403g may be
24 withheld under Exemption 3). Once it is determined that the CIA has statutory
25 authority to withhold the document, the information is categorically exempt. *Id.*
26 Therefore, for this reason, the Court GRANTS summary judgment concerning the
27 redactions found in Plaintiff's Record 9.

28

¹⁸ Plaintiff's Record 9 is also identified by MORI Document ID # 1215015.

1 Defendants describe Plaintiff's Record 23¹⁹ as "[m]ultiple analyst notes
2 (handwritten) including mathematical calculations and reflecting daily work and
3 consultations with other analysts, regarding aerodynamics." *First Buroker Decl.*, at
4 p. 44. It contains multiple dates in November and December 1997, is six pages long,
5 and contains redactions under Exemptions 3, 5, 6 and 7(C). Plaintiff contests only
6 the singular redaction premised on Exemption 3, found on the third page of the
7 record. This redaction apparently is the "acronym of a CIA component." *Second*
8 *Buroker Decl.*, at ¶ 11. The CIA component acronym falls within Defendants'
9 redaction on the same page based on Exemption 5, which is unopposed (as are the
10 redactions under Exemptions 6 and 7(C)). For that reason, the Court GRANTS
11 summary judgment concerning the redactions found in Plaintiff's Record 23.

12 Plaintiff argues that Exemption 3 cannot apply to the name of a certain CIA
13 employee whose name has appeared in a *Washington Times* article referring to an
14 intelligence medal he supposedly won for his work on the crash. If information has
15 been "'officially acknowledged,' its disclosure may be compelled even over an
16 agency's otherwise valid exemption claim." *Fitzgibbon v. Cent. Intelligence Agency*,
17 911 F.2d 755, 765 (D.C. Cir. 1990) (citation omitted). For an item to be "officially
18 acknowledged," however, the information requested must be as specific as the
19 information previously released, it must match the information previously disclosed,
20 and it must already have been made public through an official and documented
21 disclosure. *Id.* (citation omitted).

22 Defendants have not waived their right to invoke Exemption 3 to withhold this
23 individual's name. The "once-secret" report identified in the *Washington Times*
24 article is *not* among the documents responsive to Plaintiff's FOIA request. *Second*
25 *Buroker Decl.*, at ¶ 9. Conversely, none of the records from which the CIA withheld
26 names of CIA personnel have been previously released to the public. *Id.*

27
28 ¹⁹ Plaintiff's Record 23 is also identified by Document Index # 1147334 and
MORI Document ID # 1176344.

1 c. Exemption 4 (Confidential Commercial Information):
2 Plaintiff's Records 13, 27, 28, 29, 32, 45, 46, 56, 59 and
3 70

4 This exemption was analyzed in the August 31, 2006 Order. ____ F.Supp. 2d
5 ____, 2006 WL 2789870 at *10-14.

6 To assist in the crash investigation, Boeing voluntarily provided information
7 to the CIA and NTSB. *Breuhaus Decl.*, at ¶ 3. This material apparently relates to
8 "baseline mass properties, aerodynamic and engine characteristics of the Boeing
9 Model 747-100 aircraft." *First Buroker Decl.*, at ¶ 35. Boeing claims this
10 information is confidential and proprietary and has detailed the "substantial
11 competitive harm" that disclosure allegedly would cause. *Id.* See generally
12 *Breuhaus Decl.* Furthermore, Boeing claims that in the future it would "be forced to
13 reconsider" providing information such as this if it has to be disclosed in this case.
14 *Second Breuhaus Decl.*, at ¶ 14.

15 In ten records, the CIA and NTSB redacted allegedly proprietary Boeing
16 information, under Exemption 4. Defendants describe Plaintiff's Record 13,²⁰ dated
17 May 12, 1997, as an "[i]nternal email providing information relating to several points
18 to be addressed in the CIA video." *First Buroker Decl.*, at p. 69. It is one page in
19 length. Redaction 4, made under Exemption 4, apparently redacts information that
20 refers to the pitch angle of the aircraft that Boeing "gets."

21 Defendants describe Plaintiff's Record 27,²¹ dated March 3, 1998, as a "[d]raft
22 report containing analysis and preliminary conclusions regarding further assessment
23 of TWA Flight 800." *Id.* at p. 57. This eighteen-page document, entitled "Dynamic
24 Flight Simulation," was completely withheld under Exemptions 4 and 5.

25
26
27 ²⁰ Plaintiff's Record 13 is also identified by MORI Document ID # 1215017.

28 ²¹ Plaintiff's Record 27 is also identified by MORI Document ID # 1215195.
This record also contains other contested redactions which are addressed in the next
section of this Order.

1 Plaintiff's Record 28, discussed above, is a seventeen-page record concerning
2 radar tracking.

3 Defendants describe Plaintiff's Record 29,²² with pages containing various
4 dates in 1998 as well as multiple undated pages, as "[v]arious charts, extract of draft
5 report, and notes regarding radar data, which contain or reflect preliminary
6 conclusions re analysis of TWA Flight 800, ie. [sic], subset of data and preliminary
7 analysis of draft report." *Id.* at p. 58. The record is twenty-two pages long and was
8 withheld in full. Plaintiff challenges the redactions under Exemption 4 (as well as
9 Exemption 5).

10 Defendants describe Plaintiff's Record 32²³ as a "[p]rint out containing
11 trajectory simulation program setup and data." *Id.* at p. 62. It is titled "MVS
12 Trajectory Program 2D Study" and is twenty-eight pages long. The first page of the
13 record has writing that says "3/98" and also "3/15/04." None of the data in the
14 printout is redacted, but two sections of handwritten information on the first page are
15 redacted under Exemptions 3 and 4, respectively. Plaintiff challenges only the
16 Exemption 4 redaction.

17 Defendants describe Plaintiff's Record 45²⁴ as an "[e]mail conveying trajectory
18 simulation program input, 'best estimate' re certain radar data plots, and resulting
19 charts depicting certain aspects of flight simulation." *Id.* at p. 60. It is fifteen pages
20 long and undated. Plaintiff challenges redactions 4 through 6, made under
21 Exemption 4. These redactions are found on pages 2, 4 and 5 of the document.

22 ///

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25 _____
26 ²² Plaintiff's Record 29 is also identified by MORI Document ID # 1215196.
27 This record also contains contested redactions under Exemption 5 which are addressed
28 in the next section of this Order.

²³ Plaintiff's Record 32 is also identified by MORI Document ID # 1215202.

²⁴ Plaintiff's Record 45 is also identified by MORI Document ID # 1215200.

1 Defendants describe Plaintiff's Record 46²⁵ as "[m]ultiple graphs conveying
2 technical data." *Id.* at p. 63. The single page document is titled "Free Response to
3 Mass Prop and Aero Change Variation due to Thrust," and is marked "Preliminary
4 #1." This record was withheld in full based upon Exemption 4.

5 Defendants describe Plaintiff's Record 56,²⁶ dated March 25, 1997, as two sets
6 of graphs and charts depicting lift and pitching moment coefficients of Boeing Model
7 747 aircraft. *Moye Decl.*, at p. 338. The four-pages long record is dated March 24,
8 1997. It was created by Boeing, *Id.* at ¶ 54, and was withheld in full. Boeing claims
9 that a "competent engineer with access to the hypothetical configuration represented
10 in the graphs and tables . . . could determine the baseline lift coefficient and pitching
11 moment coefficient for the Boeing Model 747-100 aircraft." *First Breuhaus Aff.*, at
12 ¶ 8. Plaintiff challenges Defendants' withholding of this record based on Exemption
13 4.

14 Defendants describe Plaintiff's Record 59,²⁷ dated April 4, 1997, as three
15 graphs and two charts depicting lift, pitching moment, and drag coefficients of the
16 Boeing Model 747 aircraft. *Moye Decl.*, at p. 356. The record was created by
17 Boeing. *Id.*, at ¶ 54. It is five pages long and was withheld in full based on
18 Exemption 4. The charts and graphs compare the baseline coefficients with those for
19 an aircraft minus its forward body. Boeing claims that a "competent engineer with
20 access to the hypothetical configuration represented in the graphs and tables . . . could
21 determine the baseline lift coefficient, pitching moment coefficient, and drag
22 coefficient for the Boeing Model 747-100 aircraft." *First Breuhaus Aff.*, at ¶ 11.
23 Plaintiff challenges Defendants' withholding of this record based on Exemption 4.
24
25

26
27 ²⁵ Plaintiff's Record 46 is also identified by MORI Document ID # 1215209.

28 ²⁶ Plaintiff's Record 56 is also identified as NTSB Record 6.

²⁷ Plaintiff's Record 59 is also identified as NTSB Record 8.

1 Finally, Defendants describe Plaintiff's Record 70²⁸ as a "[c]omputer program
2 written by NTSB staff to simulate the flight path of aircraft." *Moye Decl.*, at p. 416.
3 It is undated and found in electronic form only.²⁹ Defendants withheld this program
4 in full under Exemption 4 because it incorporated engine thrust and draft, lift and
5 pitching moment coefficient data provided by Boeing. *Id.* at p. 419. The program
6 apparently cannot operate without this data; as such, Defendants claim it is not
7 segregable. *Id.* Plaintiff challenges Defendants' withholding of this record.

8 As they did in the Second CIA Motion, Defendants argue that, under the
9 *National Parks* test, release of this information likely would impair the government's
10 ability to obtain comparable information in the future, and that the disclosure of this
11 information would cause Boeing substantial competitive harm. Defendants rely
12 primarily on the Affidavits and Declarations of Richard S. Breuhaus (Chief Engineer
13 of Air Investigation Safety for Boeing) as well as the Declarations of Melba Moye
14 (Chief of the NTSB's FOIA branch) and its attached *Vaughn* index record
15 descriptions, the Declarations of Terry N. Buroker (the CIA's Information Review
16 Officer, in the Directorate of Intelligence) and the Declarations of Dennis Crider (the
17 NTSB engineer intimately involved in the Flight 800 investigation). The Court
18 discussed several of these materials, such as the Breuhaus Declarations and the First
19 Buroker Declaration, in its previous order, along with the September 8, 2005
20 Hoffstadt Affidavit, on which Plaintiff relies. See ___ F.Supp. 2d ___, 2006 WL
21 2789870 at *17-19. The declarations and affidavits the Court previously considered
22 contain information that overlaps the additional declarations and affidavits described

23
24 ²⁸ Plaintiff's Record 70 is also identified as NTSB Record 15. This record also
25 contains contested redactions under Exemption 5 which are addressed in the next
26 section of this Order.

27 ²⁹ In response to the Court's order for *in camera* submission of the NTSB
28 records, Defendants submitted "five pages of the main-body simulation executable,"
which they state are "representative of Record 15." This printout appears to consist
of data matrices in binary code and would undoubtedly be incomprehensible to
anyone lacking computer, technical or scientific expertise.

1 just above. In fact, some of the testimony is repeated word-for-word from one
2 declaration to another.

3 For the reasons set forth in the previous Summary Judgment Order, *Id.*, the
4 Court finds that there is a factual dispute as to whether Boeing will suffer substantial
5 competitive harm and Defendants have not proffered evidence sufficient to meet their
6 burden to show that release of this information likely would impair the government's
7 ability to obtain comparable necessary information in the future. Therefore, the Court
8 DENIES summary judgment concerning the contested uses of Exemption 4 in each
9 of these ten records.

10 d. Exemption 5 (Deliberative Process Privilege): Plaintiff's
11 Records 27, 28, 29, 43, 70 and 74

12 Defendants withheld six records in whole or in part based upon the deliberative
13 process privilege and Exemption 5. The Court reviewed these records *in camera*.
14 Although each record must be analyzed separately, Plaintiff argues that *none* of them
15 was predecisional, because they were all generated following the broadcast of the
16 CIA animation on November 17, 1997, which, Plaintiff argues, constituted a final
17 agency report. Defendants respond that the CIA's final conclusion concerning what
18 these eyewitnesses saw occurred after the records at issue here were generated. The
19 CIA did obtain additional data after that broadcast and it continued to refine its
20 analysis, although the additional data did not change the CIA's ultimate conclusion
21 concerning what eyewitnesses saw. Nor was any report explicitly characterized as
22 "final" subsequently issued. *Id.*

23 Exemption 5 distinguishes "between predecisional memoranda prepared in
24 order to assist an agency decisionmaker in arriving at his decision, which are exempt
25 from disclosure, and postdecisional memoranda setting forth the reasons for an
26 agency decision already made, which are not." *Renegotiation Bd. v. Grumman*
27 *Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Thus, a record is predecisional if

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1 an agency can identify a specific decision to which it is predecisional. *Maricopa*
2 *Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997).
3

4 The Court agrees with Plaintiff that the CIA animation was a final disposition
5 of that agency. However, just because it was a final disposition does not mean it was
6 the *only* final disposition. The CIA could have published some sort of addendum
7 stating it had received and considered new data and that it had (or had not) changed
8 its ultimate conclusion. Although this is not what occurred, it also is not what was
9 required. Defendants have presented uncontroverted evidence that the CIA analyzed
10 new data that led it to reach a conclusion. That the later conclusion was no different
11 than the previous one does not preclude it from being "final" for purposes of FOIA.
12 Therefore, the Court finds that so long as the records in question predate the CIA's
13 second conclusion concerning what eyewitnesses saw (which incorporated new data
14 provided by the NTSB), they may properly be considered "predecisional" (if they
15 otherwise qualify for that status).

16 The Court will now describe and analyze each record.

17 *i. Plaintiff's Record 27*

18 Plaintiff's Record 27, discussed above, is an eighteen-page "[d]raft report
19 containing analysis and preliminary conclusions" concerning the crash. It is entitled
20 "Dynamic Flight Simulation." *First Buroker Decl.*, at p. 57. It is dated March 3,
21 1998. It was withheld in full based upon the deliberative process privilege.

22 The handwritten edits and the language used by the author of Record 27
23 demonstrate that it was written prior to the final agency decision, and Plaintiff
24 presents no evidence to the contrary. Therefore, the Court finds that this record is
25 predecisional.

26 Record 27 also is deliberative, in that its disclosure would expose the CIA's
27 "decisionmaking process in such a way as to discourage candid discussion within the
28 agency and thereby undermine the agency's ability to perform its functions."

///

1 *Assembly of the State of California v. United States Dep't. of Commerce*, 968 F.2d,
2 916, 921 (9th Cir. 1992) (en banc), as amended on denial of reh'g (Sept. 17, 1992).
3 The text confirms that the document was prepared "in order to assist an agency
4 decisionmaker in arriving at his decision." *Maricopa*, 108 F.3d at 1093. The
5 language, context, and handwritten edits in the record support that it was deliberative
6 in nature. The document explains the steps CIA analysts took in calculating the flight
7 simulation, particular challenges they faced, which data and other information they
8 found important, shortcomings of their analysis to that point, and recommendations
9 for the ultimate decision-makers.

10 Record 27 is not segregable, except to very limited extent that its title, date and
11 the bolded titles may be released. The entire text of the document otherwise
12 encompasses the deliberative process of its author(s). The Court therefore GRANTS
13 summary judgment as to the remainder of Record 27, including its text, graphs and
14 handwritten notes.

15 *ii. Plaintiff's Record 28*

16 Plaintiff's Record 28, also discussed above, is a seventeen-page "[d]raft report
17 concerning preliminary analysis and conclusions regarding radar tracking" and is
18 entitled, appropriately, "Analysis of Radar Tracking." *Id.* at p. 56. It is dated March
19 17, 1998. Defendants withheld this record in full based upon the deliberative process
20 privilege.

21 Record 28 contains both text and graphs. Handwriting on the first page states
22 "draft" and "shown to NTSB but never finalized." The "never finalized" notation
23 and the language in the text support that it was written prior to the final agency
24 decision, and Plaintiff presents no evidence to the contrary. Therefore, Record 28 is
25 predecisional. It also is deliberative. It contains conclusions and thoughts of CIA
26 analysts concerning the viability and accuracy of certain radar data, the application
27 of such data in determining the flight path of Flight 800, the problems with certain
28 data and the thought processes of individuals who analyzed the data. As a whole, the

1 text of this document shows that it was prepared "in order to assist an agency
2 decisionmaker in arriving at his decision." *Maricopa*, 108 F.3d at 1093. Its
3 disclosure would expose the CIA's "decisionmaking process in such a way as to
4 discourage candid discussion within the agency and thereby undermine the agency's
5 ability to perform its functions." *Assembly*, 968 F.2d at 921.

6 As with Record 27, the Court finds that Plaintiff's Record 28 is not segregable,
7 except to the very limited extent of its title, date, the bolded titles of each section of
8 the memorandum, Figure 1 (on page 3 of the record) along with its accompanying
9 notation, and the entirety of the Appendix.³⁰ Release of those portions of Record 28
10 would neither discourage candid discussions among agency personnel nor undermine
11 the agency's ability to perform its functions. To that extent only, the Court DENIES
12 summary judgment as to Plaintiff's Record 28, but GRANTS summary judgment as
13 to the remainder of Record 28, including its text and additional graphs.

14 *iii. Plaintiff's Record 43*

15 Plaintiff's Record 43, also discussed above, is a five-page undated "[d]raft with
16 handwritten annotations reflecting candid discussion and opinion . . . regarding CIA
17 analysis of eyewitness reports" about the crash. *Id.* at p. 65. It is entitled "An
18 Overview of the C.I.A.'s Analysis of Witness Statements in the TWA Flight 800
19 Investigation." The cover page preceding the overview is described as a "Response
20 to allegations of SA [Name] regarding C.I.A. analysis." Many comments and edits
21 appear on each of the five pages, in different handwritings. The shaded word "draft"
22 appears across the entirety of the four pages of text. Defendants withheld this record
23 in full based upon the deliberative process privilege.

24 Notwithstanding the uncertainty as to the date(s) of its creation, Record 43
25 appears to be predecisional and almost certainly is deliberative. It contains
26 assessments of the CIA's analysis of witness statements during the investigation. The

27
28 ³⁰ The data found in the Appendix is not deliberative for the same reasons as it
was not in Plaintiff's Records 66 and 78 in the First Summary Judgment Order. ____
F.Supp. 2d ____, 2006 WL 2789870 at *23-25. See Plaintiff's Record 74, below.

1 handwritten comments unquestionably are part of a give-and-take exchange. The
2 Court GRANTS summary judgment to defendants as to this Exemption.

3 *iv. Plaintiff's Record 74*

4 Defendants describe Plaintiff's Record 74³¹ as a "[t]able tracking the location
5 in the ocean of debris from TWA flight 800." *Id.* at p. 483. The undated record,
6 which was withheld in full, "consists of fifteen pages of data . . . that were collected,
7 collated and prepared or edited by NTSB staff in order to track and categorize the
8 latitude, longitude, description and comments concerning pieces of debris from TWA
9 flight 800 located in the ocean." *Id.* Defendants state that this data "provided a
10 starting point and confirmation for the sequencing, as measured by the location of the
11 debris, of events that occurred during the crash," and that the sequence ultimately
12 developed from this data was used in the creation of simulations included in
13 Addendum II. *Id.* Defendants state this data was preliminary in nature and subject
14 to confirmation and correction. *Id.* at p. 484. Record 74 also contains handwritten
15 comments, opinions and speculations of investigators. *Id.*

16 Moye declared that the data in this document was collated in anticipation of
17 and ultimately used in the creation of Addendum II. *Id.* at p. 483. The Court finds
18 that, although the document itself is undated, Defendants have shown that this record
19 is preliminary in nature.

20 Defendants maintain that the act of collecting and organizing data regarding
21 the position of ocean debris is deliberative. The Court cannot agree. For the reasons
22 set forth in the previous Summary Judgment Order, especially as applied to Plaintiff's
23 Records 66 and 78, the Court finds that the NTSB's selection and organization of
24 factual data concerning debris recovery, without more, is not deliberative.

25 This determination is not the end of the Court's inquiry, however. Record 74
26 contains seven columns in addition to the numerous handwritten notes and
27 comments. Six of these columns -- all but the "Comments" column -- contain raw

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31 Plaintiff's Record 74 is also identified as NTSB Record 27.

1 information that does not reflect or reveal mental processes of the NTSB
2 investigators. However, having reviewed the document *in camera*, the Court
3 concludes that the information found under the column entitled "Comments," as well
4 as the handwritten notes found in the record, *are* deliberative; they evaluate and
5 analyze the facts contained in the other columns. Disclosure of the "Comments"
6 column and the handwritten annotations "would expose [the NTSB's]
7 decisionmaking process in such a way as to discourage candid discussion within the
8 agency and thereby undermine the agency's ability to perform its functions."
9 *Assembly*, 968 F.2d at 921 (quotation omitted).

10 FOIA requires that a reasonably segregable portion of a record shall be
11 provided following deletion of the portions which are exempt. 50 U.S.C.A. § 552(b).
12 Although the NTSB may not withhold the entirety of Record 74 simply because it
13 contains some exempt material, that material is not "inextricably intertwined" with
14 the non-exempt portions. *See Mead Data Central*, 556 F.2d at 260. Therefore, the
15 Court GRANTS IN PART AND DENIES IN PART Defendants' use of Exemption
16 5 to withhold Plaintiff's Record 74. Only the Comments column and the handwritten
17 notes may be withheld.

18 *v. Plaintiff's Record 29*

19 Plaintiff's Record 29, discussed earlier, consists of twenty-two pages of charts,
20 draft reports and notes regarding radar data that allegedly "contain or reflect
21 preliminary conclusions" concerning the crash, according to Defendants' *Vaughn*
22 index. Having reviewed this record *in camera*, the Court does not adopt the
23 government's description.

24 Record 29 appears to consist of several sets of papers that apparently were
25 assembled as one file. The first three pages contain the date March 17, 1998, in
26 handwriting, and consist of graphs of azimuth and elevation from a specified
27 location. The fourth page appears to be a printout of an execution from a computer
28 file. It is dated January 6, 1998, and contains what appears to be several data entries

1 expressed in numeric form. The fifth page contains two formatted graphs, one
2 concerning altitude and one radar range. It is undated. Almost all the remaining
3 seventeen pages consist of undated graphs of various data (with the exception of one
4 graph dated January 14, 1998). For example, one graph depicts radar tracking by
5 various local radar sites and the flight path of the aircraft. Another page shows the
6 radar locations of four sites mapped by latitude and longitude.

7 Defendants submit two conclusory statements in support of their argument that
8 this record is preliminary. *See First Buroker Decl.*, at p. 58; *Second Buroker Decl.*,
9 at ¶ 17. If those pages that contain dates between January and March 1998 were
10 created at those times, that would be during the period when the CIA reviewed and
11 incorporated "new" NTSB data into its analysis, and that would be consistent with
12 Defendants' characterization. However, these charts are not deliberative, despite
13 Defendants' conclusory statements to the contrary.

14 Defendants claim that these graphs and charts contain "intra-agency and inter-
15 agency deliberations with NTSB, including analyst's selection of variables,
16 assumptions, calculations and graphical representations..." *See First Buroker Decl.*,
17 at p. 58; *Second Buroker Decl.*, at ¶ 17. I do not agree. This record contains, at most,
18 graphical representations of factual data. If any deliberation concerning the
19 manipulation of such data occurred, it could only be about how to represent the data
20 in this manner. Therefore, for the reasons set forth in the previous Summary
21 Judgment Order from pages 42 through 49, especially as it applies to Plaintiff's
22 Record 76, *See* ___ F.Supp. 2d ___, 2006 WL 2789870 at *25, I find that these
23 graphical representations of factual data concerning debris recovery are not
24 deliberative. I therefore DENY Defendants' use of Exemption 5 and the deliberative
25 process privilege to withhold Plaintiff's Record 29.

26 *vi. Plaintiff's Record 70*

27 Plaintiff's Record 70, (NTSB Record 15) also discussed above, is a computer
28 program written to simulate the flight path of Flight 800, and available only in

1 electronic form. *Moye Decl.*, at p. 416. This program was withheld in full based
2 upon the deliberative process privilege.

3 Dennis Crider, an NTSB employee, developed a flight simulation software
4 program prior to joining the NTSB. *Crider Decl.*, at ¶ 9; *Moye Decl.*, at p. 416.
5 While at the NTSB, Crider further developed and used the simulation program in
6 several accident investigations, including that of Flight 800. *Crider Decl.*, at ¶ 9;
7 *Moye Decl.*, at p. 416.

8 There is no standardization for simulation code, and the program was never
9 intended for public use, so it was written in a format intuitive to Crider.³² *Crider*
10 *Decl.*, at ¶ 8. At the time of the Flight 800 investigation, there were no instructions
11 or guides for using the program except for limited comments written by Crider. *Id.*
12 (Defendants do not explain the comments.) The program itself uses mathematical
13 models³³ that describe the forces acting on the specific aircraft type at issue to derive
14 the motion resulting from these forces. *Id.* The mathematical formulations necessary
15 for the simulation program are written in computer code, and according to Crider are
16 not segregable. *Id.*

17 One of Crider's assignments during the investigation of Flight 800 was to
18 determine the flight path of the aircraft after it lost its forward fuselage. *Moye Decl.*,
19 at p. 416. Crider modified his program for this task. *Crider Decl.*, at ¶ 19; *Moye*
20 *Decl.*, at p. 416. NTSB management reviewed and commented on his work after the
21 initial simulation was complete. *Crider Decl.*, at ¶ 19. Crider explained that, over
22 time, he continued to exercise his own judgment in determining whether the program
23 was operating as designed and whether it was representing and using data

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27 ³² This program is written in C++, with portions written in C. *Crider Decl.*, at
28 ¶ 9.

³³ Some of these mathematical models contain information the government
claims is proprietary to Boeing. *Moye Decl.*, at p. 417.

1 appropriately. He modified the program and the simulation as necessary, such as
2 when new data became available. *Id.* at ¶¶ 20-21, 23-24.

3 To run a specific simulation, the program needs such information as the
4 starting condition (airspeed, position, altitude, etc.), specific configuration of the
5 flight (such as flap setting and landing gear position), the aircraft's weight and center
6 of gravity, and some basis for guiding the aircraft. *Crider Decl.*, at ¶¶ 11-12; *Moye*
7 *Decl.*, at p. 418. The program may be adjusted and adapted to analyze differing
8 versions of aerodynamic data and physical attributes of aircraft.³⁴ *Id.* at p. 421. The
9 flight data recorder and radar data provided much of this information for Flight 800.
10 *Id.* at p. 418.

11 Defendants claim this program was used to provide information the NTSB
12 used in determining the probable cause of the crash of Flight 800 and the safety
13 recommendations that followed. They claim that an understanding of the flight path
14 following the separation of the plane's nose was expected to aid the NTSB in
15 understanding the causes of the crash. *Id.* at pp. 421-22. Defendants argue that
16 Crider used the program to pursue different possibilities related to the flight path of
17 Flight 800. *Id.* at p. 422. Crider considers his simulation to be a tool to do so. *Supp.*
18 *Crider Decl.*, at ¶ 5. The source code of the simulation used by Crider is no longer
19 available, as it has been updated and improved over time. *Id.* at ¶ 5. Therefore, the
20 only "simulation software" maintained as a record is the executable file, which
21 consists of binary machine language (0s and 1s).³⁵ *Id.*

22 Crider explains that, over time, he would run simulations using his program
23 and the data inputs would be changed between each run to attempt to make the
24

25 ³⁴ Even so, though, the record at issue is simply a fixed iteration consisting of
26 the program at a certain time, *not* a series of programs that might reveal how they
27 changed as Crider refined them.

28 ³⁵ Crider did retain the last control system source file and aerodynamics source
file specific to Flight 800. *Supp. Crider Decl.*, at ¶ 6. However, these do not appear
to be a part of Plaintiff's Record 70, but rather two separate responsive records.

1 simulation results "best represent the action of the aircraft as reflected by the radar
2 data." *Id.* at ¶¶ 8-9. Crider claims this is a "deliberative, analytical process in which
3 staff must be free to adjust and experiment without fear that staff work at whatever
4 stage will be released and compared to the Safety Board's ultimate conclusions . . .
5 ." *Id.* at ¶ 10.

6 Plaintiff does not challenge that this record is predecisional, and the Court
7 finds that it is. However, the Court does not agree with Defendants that content of
8 the simulation program, as opposed to that of the input or output files, is deliberative.

9 First, although Crider clearly utilized some judgment in selecting "relevant"
10 data he needed for his simulation program, *see Crider Decl.*, at ¶¶ 18, 23-24, the
11 selection of some data from a larger set does not, alone, amount to a deliberative
12 process under Exemption 5. *See First Summary Judgment Order*, ___ F.Supp. 2d
13 ___, 2006 WL 2789870 at *14, 23. Instead, the government must show that the
14 deliberative process can be determined from the selection of the data alone. *Carter*
15 *v. United States Dep't of Commerce*, 307 F.3d 1084, 1091 (9th Cir. 2002).
16 Defendants present no evidence to this end.

17 Second, Crider explains that he "performed all of the calculations and made
18 all of the necessary adjustments to the computer program to simulate the flight path
19 of TWA flight 800 for the NTSB." *Crider Decl.*, at ¶¶ 19, 24. Although Crider may
20 have used his "engineering knowledge and professional judgment" in making these
21 decisions, *see Id.* at ¶ 20, there is no evidence that, by reviewing the disclosed source
22 file, a reader would be able to understand or reconstruct the NTSB's deliberative
23 process. *See Assembly*, 968 F.2d at 922-23.

24 Finally, Crider states that management reviewed and commented on his work
25 after the initial simulation was completed. *See Crider Decl.*, at ¶ 19. However, there
26 is no allegation, much less evidence, that disclosure of this program would disclose
27 the content of that review and content. Indeed, generally speaking, Crider does not
28 claim that the disclosure of the program would "expose an agency's decisionmaking

1 process in such a way as to discourage candid discussion within the agency and
2 thereby undermine the agency's ability to perform its functions."³⁶ See *Assembly*,
3 968 F.2d at 921 (quotation omitted). His simulation program was merely a tool used
4 in connection with other data to derive a result based upon that data. Defendants
5 have failed to carry their burden that what has been withheld "represent[ed] the
6 mental processes of the agency in considering alternative courses of action prior to
7 settling on a final plan." *Nat'l Wildlife Fed'n*, 861 F.2d at 1122. Therefore, I DENY
8 Defendants' use of Exemption 5 and the deliberative process privilege to withhold
9 this record.

10 **III. Conclusion**

11 For the foregoing reasons, the Court GRANTS summary judgment as to
12 Plaintiff's Records 9, 23, 27 (in part), 28 (in part), 43 and 74 (in part). For Records
13 27 and 28, Defendants shall produce the title, date, bolded sub-titles and (in the case
14 of Record 28) Figure 1 and the Appendix. For Record 74, Defendants shall produce
15 everything but the "Comments" column and the handwritten notes. The Court
16 DENIES Defendants' summary judgment motions as to all the other disputed
17 Records.

18 Not later than ten days from the date of this Order the parties shall lodge a
19 stipulated "[Proposed] Judgment" reflecting this Court's rulings on all three summary
20 judgment motions. By stipulating to the terms of the "[Proposed] Judgment," neither
21 side shall waive his or its right to challenge those rulings on appeal. If the parties fail

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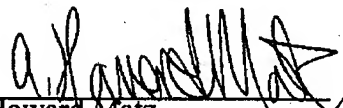
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28 ³⁶Conversely, Crider does make such a claim concerning the release of the input
and output files used in connection to this simulation program. *Supp. Crider Decl.*,
at ¶ 10.

1 to stipulate to such a "[Proposed] Judgment," the Court may sanction monetarily any
2 party or lawyer whose position was unreasonable.

SCANNED

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4 IT IS SO ORDERED.

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6 DATED: October 4, 2006


A. Howard Matz
United States District Judge

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